

**United States Department of Labor
Employees' Compensation Appeals Board**

M.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Metro, GA, Employer**

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**Docket No. 13-159
Issued: May 14, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 31, 2012 appellant filed a timely appeal from a July 11, 2012 merit decision and a September 20, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant is entitled to a schedule award based on her accepted conditions; and (2) whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 2, 2010 appellant, then a 48-year-old mail handler, filed a traumatic injury claim for a back injury which occurred while lifting on June 15, 2010. OWCP accepted the claim for lumbar sprain and thoracic or lumbosacral neuritis or radiculitis and paid compensation benefits.

On November 18, 2011 appellant filed a claim for a schedule award. In a November 28, 2011 letter, OWCP advised her that the medical evidence of record was insufficient to support her schedule award claim as there was no narrative report outlining her current condition or whether she had any permanent impairment as a result of her work-related condition. Appellant was informed of the medical evidence needed to support a schedule award claim.

In a December 9, 2011 attending physician's report, Dr. Feroze A. Yusufji, a Board-certified orthopedic surgeon, opined that appellant's lumbar radiculopathy was caused or aggravated by her work activity. He further opined that she was permanently partially disabled and could work with restrictions. In a December 20, 2011 letter, OWCP advised Dr. Yusufji of medical evidence needed to support an impairment determination.

OWCP referred appellant to Dr. Alexander N. Doman, a Board-certified orthopedic surgeon. In a January 4, 2012 report, Dr. Doman noted his December 29, 2011 examination findings and his review of appellant's medical record. He stated that there were no objective findings to support the accepted diagnoses of lumbar strain or thoracic radiculitis and opined those conditions resolved long ago. Dr. Doman found that appellant's subjective complaints grossly outweighed her objective findings and such complaints were on a completely nonphysiologic and nonanatomical basis. He opined that she was capable of performing regular-duty work as mail handler.

On January 10, 2012 OWCP requested that Dr. Doman address whether appellant had permanent impairment due to the accepted lumbar strain and thoracic radiculitis conditions. In a January 18, 2012 supplemental report, Dr. Doman opined that appellant reached maximum medical improvement three months from the June 15, 2010 injury or September 15, 2010. He advised that she had no orthopedic condition affecting the extremities. The objective findings, including nerve conduction velocity studies of the extremities, were normal, as were lumbar x-ray films. There were no objective findings on physical examination. Dr. Doman opined that there was zero percent impairment of the affected extremities.

In a January 26, 2012 report, an OWCP medical adviser, Dr. James W. Dyer, MD, opined that appellant reached maximum medical improvement on September 15, 2010. He advised that she had chronic lumbar strain with subjective lower back pain but there are no objective signs or findings to support a diagnosis of thoracic or lumbosacral neuritis or radiculitis. The medical adviser noted that appellant had symptom exaggeration with complaints on examination that were completely nonphysiologic and nonatomic in their basis and could only be explained by intentional efforts by her to deceive the examining second opinion physician. He further noted that appellant's treatment had been nonsurgical with epidural steroid injections and physical therapy. The medical adviser stated that there were no motor or sensory deficits of the lower extremity based on Dr. Doman's examination. Therefore, he found no impairment of the right and left lower extremities.

In a January 18, 2012 progress report, Dr. Yusufji noted tenderness, palpable paravertebral muscle tightness with restriction of range of motion. There was no discontinuity of the paravertebral muscles, no mass, increased gap between the spinous processes, positive straight leg raising with no definite neurologic deficit. Dr. Yusufji continued appellant's restrictions of no lifting over 20 pounds and no climbing or kneeling down. In another report dated January 18, 2012, he opined that she had reached maximum medical improvement. Dr. Yusufji indicated that the diagnosis was based on physical examination of paravertebral muscle tightness, significant restriction of range of motion and positive straight leg raising on the right, cross positive on the left. He noted results of objective studies. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Yusufji opined that appellant had 12 percent impairment to the body under Table 17-4, page 570, Lumbar Spine Regional Grid motion segment lesions class 2.

In a February 1, 2012 report, the medical adviser, Dr. H.P. Hogshead M.D., noted that OWCP does not recognize back pain or spinal disorders and only extremity impairment resulting from spinal nerve root deficit can be rated. He noted that, in his January 18, 2012 report, Dr. Yusufji stated that he could not find a definite neurologic deficit. Dr. Hogshead further noted that Dr. Yusufji's use of Table 17-4 of the A.M.A., *Guides* was incorrect. Based on Dr. Doman's second opinion report and Dr. Dyer's review of January 26, 2012, Dr. Hogshead opined that appellant had zero percent impairment of both lower extremities.

In a February 28, 2012 letter, OWCP provided Dr. Yusufji a copy of the medical adviser's February 1, 2012 report and requested comments as to whether he agreed with the impairment rating to the extremities.

In a March 13, 2012 letter, Dr. Yusufji noted the results of objective testing. He stated that the results from the electromyogram (EMG) and nerve conduction study were reliable reproducible evidence upon which to base his diagnosis and to show that appellant has extremity impairment resulting from spinal nerve root deficit.

OWCP found a conflict in medical opinion as to whether appellant was disabled or partially disabled and to clarify the accepted conditions. It referred her to Dr. Harold H. Alexander, a Board-certified orthopedic surgeon, for an impartial medical opinion. In a March 21, 2012 report, Dr. Alexander noted the history of injury, his review of the medical records, including recent diagnostic tests and presented examination findings. The recent EMG showed right lower extremity chronic denervation at L4; a May 2011 discogram showed normal L3-4 level with L4 level with leakage and 5/5 pain score and L5-S1 without leakage, 5/5 pain score. Dr. Alexander opined that it was possible that the work-related injuries resulted in damage to appellant's L4-5 discs and L5-S1 discs, accounting for her primary back symptoms with some radiation into her right leg. He opined that she could not return to her date-of-injury work with heavy lifting, prolonged standing and bending but was capable of lighter-duty work.

In an April 11, 2012 progress report, Dr. Yusufji presented examination findings. He noted that straight leg raising was positive but with no definite neurologic deficit.

In an April 24, 2012 report, Dr. Dyer, the medical adviser, opined that maximum medical impairment was reached on September 15, 2010. He reviewed the medical adviser's January 26,

2012 report, Dr. Yusufji's March 13, 2012 report; and Dr. Alexander's March 21, 2012 report and opined that, based on lack of objective changes in lower extremities, appellant had zero percent impairment in the lower extremities.

In a May 20, 2012 letter, OWCP requested that Dr. Alexander clarify his opinion regarding appellant's medical status and disability. In a May 23, 2012 work capacity evaluation form, Dr. Alexander opined that she had reached maximum medical improvement and was able to work with restrictions. He noted that the restrictions would only be good for one year, at which time appellant would need to be reevaluated.

Additional progress reports dated May 16 and June 6, 2012 from Dr. Yusufji noted positive straight leg raise with no definite neurologic deficit.

By decision dated July 11, 2012, OWCP denied appellant's claim for a schedule award.

On August 11, 2012 appellant requested reconsideration. In a September 11, 2012 statement, she indicated the affect the work-related injury had on her life style and expressed her confusion over how the Office of Personnel Management (OPM) could review her medical records and find her disabled as a result of the injury but OWCP came to a different conclusion. Appellant included a June 12 (date illegible) letter from OPM, which found her to be disabled from her mail handler position due to lumbar radiculitis and lumbar herniated nucleus pulposus and several witness statements attesting to her back condition during a family gathering.

Reports from Dr. Yusufji dated June 6, July 11 and 18, 2012, noted appellant's condition, which included a positive straight leg raise, but no definite neurologic defect. In his July 18, 2012 report, he indicated his disagreement with OWCP's finding that she has a zero percent impairment rating given the definite positive findings on examination.

By decision dated September 20, 2012, OWCP denied appellant's reconsideration request on the grounds that the evidence submitted was cumulative, repetitious and immaterial.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.² FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for

² For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks compensation. 5 U.S.C. § 8107(c)(2).

evaluating schedule losses.³ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁴

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.⁵ Neither, FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.⁶ However, a schedule award is permissible where the employment-related back condition affects the upper and/or lower extremities.⁷

The A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments.⁸ OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.⁹ The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that the medical evidence fails to establish that appellant sustained any permanent impairment to a scheduled member of the body. OWCP accepted her claim for lumbar sprain and thoracic or lumbosacral neuritis or radiculitis. Dr. Yusufji found that appellant had 12 percent whole body impairment. Dr. Doman, a second opinion physician, found that she had zero percent impairment of the affected extremities as there were no objective findings on examination. OWCP referred appellant's case to the medical adviser who opined that she had no ratable impairment to the lower extremities based on lack of objective changes in the lower extremities. Dr. Alexander also examined her and made findings after which the medical adviser further considered whether she had ratable impairment of an extremity.¹¹

³ 20 C.F.R. § 10.404.

⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

⁵ *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

⁶ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

⁷ *Supra* note 4 at Chapter 2.808.6a(3).

⁸ *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

⁹ *Supra* note 4 at Chapter 3.700, Exhibit 4. See *R.M.*, Docket No. 12-1811 (issued March 14, 2013).

¹⁰ *Id.*

¹¹ While OWCP found a medical conflict regarding appellant's disability and the nature of the accepted condition and referred appellant to Dr. Alexander to resolve the matter, there was no medical conflict under 5 U.S.C. § 8123(a) with regard to impairment under 5 U.S.C. § 8107 as Dr. Yusufji did not specifically rate any permanent impairment of a scheduled body member pursuant to the A.M.A., *Guides*. Instead, as discussed *infra*, he rated whole person impairment which is not allowed under section 8107 or OWCP regulations.

OWCP relied upon the opinion of the medical adviser in determining that appellant had no impairment.

Dr. Yusufji opined that appellant had 12 percent impairment. The Board notes that FECA does not authorize schedule awards for loss of use of the body as a whole.¹² It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and OWCP may rely on the opinion of its OWCP medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.¹³ An OWCP medical adviser reviewed Dr. Yusufji's impairment report and noted that Dr. Yusufji did not find a definite neurologic deficit on examination, OWCP can only rate extremity impairment from spinal nerve deficits and Dr. Yusufji's use of the cited table within the A.M.A., *Guides* was incorrect. The medical adviser properly found that Dr. Yusufji's findings did not comport with the A.M.A., *Guides* for rating an extremity and his impairment opinion was of little probative value to establish impairment under the A.M.A., *Guides*.

The medical adviser also reviewed the examination findings of Dr. Doman and Dr. Alexander along with Dr. Yusufji's progress reports. In an April 24, 2012 report, the medical adviser advised that, based on lack of objective changes in lower extremities, appellant had no impairment in the lower extremities. While Dr. Yusufji submitted additional progress reports after the medical adviser's review of the evidence, he found no definite neurologic deficit from which an impairment could be determined, nor did he purport to rate impairment under the A.M.A., *Guides* or *The Guides Newsletter*¹⁴ for a scheduled member of the body.

The Board finds that OWCP properly relied upon its medical adviser who concluded that appellant had no permanent impairment of a scheduled member under the A.M.A., *Guides*. The medical adviser properly reviewed the medical record and found no basis for rating impairment to a scheduled body member.¹⁵ He properly found that there was no medical evidence of impairment to either leg resulting from the accepted conditions and that; therefore, there was no ratable impairment under the sixth edition of the A.M.A., *Guides*.

Appellant did not submit sufficient medical evidence to establish that she sustained a permanent impairment to a specified member, organ or function of the body listed in FECA or its implementing regulations. The medical evidence of record supports that she has no lower extremity impairment. The Board finds that appellant is not entitled to a schedule award as a result of her employment-related accepted back conditions.

¹² D.A., Docket No. 10-2172 (issued August 3, 2011); J.Q., 59 ECAB 366 (2008).

¹³ J.B., Docket No. 09-2191 (issued May 14, 2010).

¹⁴ See *supra* notes 8 to 10.

¹⁵ The Board notes that it is appropriate for an OWCP medical adviser to review the clinical findings of the treating physician to determine the permanent impairment. See *supra* note 4 at Chapter 3.500.5(c) (September 1995); Richard R. LeMay, 56 ECAB 341 (2006).

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128 of FECA,¹⁶ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁷ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁸ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁹ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²⁰ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.²¹

ANALYSIS -- ISSUE 2

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.²²

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant's statements and those of the witnesses relate to the factual circumstances of her claim

¹⁶ Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁸ *Id.* at § 10.607(a).

¹⁹ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

²⁰ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

²¹ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

²² The Board notes that on appeal appellant discussed the same evidence submitted on reconsideration.

and her beliefs regarding her disability. The underlying issue in this case is whether appellant established any objective verification of a measurable impairment of a scheduled member due to her work injury. That is a medical issue which must be addressed by relevant medical evidence.²³ Therefore, appellant's statement and opinions as well as the witness statements do not constitute a basis for reopening the claim.²⁴

Appellant resubmitted Dr. Yusufji's June 6, 2012 report, which was previously of record when the July 11, 2012 OWCP decision was issued. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²⁵ Appellant also submitted reports from Dr. Yusufji dated July 11 and 18, 2012. While these reports are new, they are insufficient to reopen appellant's claim as Dr. Yusufji merely notes his disagreement that appellant has zero percent impairment but fails to provide any further discussion of any impairment. These reports are similar to his previous reports regarding permanent impairment. Because he does not specifically address impairment of a scheduled body member pursuant to the A.M.A., *Guides* or *The Guides Newsletter*, these reports are not relevant. Thus, appellant did not submit any pertinent new and relevant medical evidence addressing the underlying issue in this case.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant failed to establish that she has a ratable impairment of the lower extremities due to her employment-related lumbar condition. OWCP properly denied her request to reopen her claim for further review of the merits.

²³ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

²⁴ Appellant also asserted that her claim was supported by an OPM disability finding, but disability under OPM standards is not relevant to an impairment determination under 5 U.S.C. § 8107. See *Freddie Mosley*, 54 ECAB 255 (2002) (the Board has held that entitlement to benefits under another act does not establish entitlement to benefits under FECA).

²⁵ See *J.P.*, 58 ECAB 289 (2007); *Richard Yadron*, 57 ECAB 207 (2005).

ORDER

IT IS HEREBY ORDERED THAT the September 20 and July 11, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 14, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board